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### Through Our Glass Darkly: Does Comparative Law Counsel the Use of Foreign Law in U.S. Constitutional Adjudication?

Kenneth Anderson

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# Through Our Glass Darkly: Does Comparative Law Counsel the Use of Foreign Law in U.S. Constitutional Adjudication?

*Kenneth Anderson\**

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## I. A CONVERSATION LONG AGO WITH PROFESSOR GLENDON

Some twenty or so years ago, Mary Ann Glendon said something to me in a conversation in her office at Harvard Law School. There's no special reason why she would remember it or the conversation itself; I was a visiting professor that term, teaching international human rights and the laws and ethics of war, and she was suggesting that I needed to reach beyond public international law into comparative law. This was a field about which I knew

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very little, and in explaining why I should find it important, she said, "We see through our glass darkly, after all."

I was puzzled by her use of "our." Why "our" rather than the usual scriptural "the" or "a" glass darkly? She explained, however, with reference to different societies and their different legal systems—the very stuff of comparative law—that each sees through its own glass and each sees in some way "darkly," peering through the accreted overlays of its own customs, traditions, bureaucratic and administrative processes, toward a moral and rational reading of that society's law. Every society's "glass" carries with it obscuring layers, both moral and rational, and part of the value of comparative law as a field of study is that it provides tools for seeing and understanding those blinders—the motes in others' eyes and the beams in one's own, if all goes well—in order to bring light to the darkness.

We don't have unmediated access to any perfectly moral, perfectly rational, perfectly idealized or abstract legal form—even if, in principle, there were such a thing. What we do have, however, is the ability to compare ways of doing things in different societies and their legal systems, in order to see through the exercise of perspective, what might be a better (or sometimes worse) way of doing things in our own legal system and society. But then Professor Glendon added (I paraphrase the conversation from memory), "I said 'ours' because it matters that it's 'ours.' There's nothing wrong with preferring your own way of seeing through the glass, just because it's yours—the product of your society, your history, your attachments and affections and those of your people. That's especially true of the founding texts of a political society and law—a society's constitution."

I did not take up comparative law as a field of scholarship, but some years later, I did take up a question deeply implicated here: the question of the proper role, if any, of other legal systems and societies and their law in interpreting one's own fundamental, founding constitutional law. I took up that question because, in the late 1990s up through the late 2000s, a distinct intellectual climate had taken hold, particularly among influential academic legal elites as well as some U.S. Supreme Court Justices, that foreign law ought to have a role to play—perhaps a significant one—in the interpretation and adjudication of U.S. constitutional questions.

Beginning to write on this topic in the early and mid-2000s, this conversation with Professor Glendon immediately came to my

mind. It has had a framing influence on my views ever since. There's no reason why Professor Glendon would recall this conversation, and I certainly don't want to put onto her any of my views. But despite my failure to become a "comparativist" in the legal academy, and as with so many other things in my thinking in law and ethics, Mary Ann Glendon has had a profound and salutary influence on my work—on my work, but also (however improbable those who know me might think this) on *me* as a reasoning, moral person.

Comparative and international law, yes, international human rights law, yes, just war and the ethics of war, yes. But also, I feel personally compelled to add, a long list of other and deeper matters: my thinking about the religion in which I was raised but had since departed, Mormonism, and its place in the world, by comparison (that *method* of comparativism again) to the faith of my wife and daughter, American Catholicism; the role and meaning of intellectual elites within a faith-and-reason religious tradition; communitarianism, civil society, private and public, and individual rights and liberties; the place of love and the bonds of affection in ethics and politics; and, finally, the Catholic insistence on the irreducibly *social* as a category in law, morality, politics, and thus, social theory.

I owe Professor Glendon a great personal and intellectual debt stretching back over decades; this particular topic is among them. In the remainder of this brief essay, however, I won't try to offer a commentary as such on Professor Glendon's Duquesne lecture, but instead will simply reflect on the proper role, in my view, of where foreign law has a place in U.S. constitutional adjudication (and where it doesn't), but, more especially, I will comment on the trajectory that the "foreign law in U.S. constitutional adjudication" has been on since the high water mark of that debate that occurred somewhere around 2006.

## II. COMPARATIVISM AS METHODOLOGICAL PERMISSIONS AND LIMITATIONS: ACADEMIC LAW'S ANTHROPOLOGISTS

Implicit in Professor Glendon's remarks is a double message. On the one hand, because any particular society and its legal system, its substantive law as well as processes and institutions of adjudication and interpretation of law, will necessarily be partial—partial to itself, and the product of its own history—comparativism counsels looking to other legal systems and societies in order to understand and, perhaps, amend one's own.

Knowledge of what is done in other places, why it is done, and how it is done provides a form of expertise that comparative law offers to one's own legal system.

Comparativism does more than merely offer expertise, however; on the other hand, it gives a normative reason to use it, at least to consider how one's own society addresses certain legal questions by comparison to other places. In this normative regard, at least as compared to some idealized legal system, comparative law offers comparisons in the real world. As an academic field, it makes such knowledge available; as a normative proposition, it gives permission to and affirms the positive value of knowing and considering how and why other places do things differently.

That's in the way of "permissions" offered by comparative law. But, as Professor Glendon has pointed out many times in many places, comparative law as an academic endeavor insists equally upon "limitations" that derive from comparative law methodologies themselves. Judges, as Professor Glendon has eloquently noted, are sometimes wont to cherry pick holdings, rulings, cases, and decisional language that happen to support whatever substantive proposition the judge endorses in the case. Yet the methodology of comparative law says that this is never a justifiable way to proceed comparatively. Merely quoting substantive holdings or language from cases fails to place them in the historically, socially, politically, ethically, and legally special context in which substance finally obtains. Only within that matrix can one properly understand or interpret the substance; it scarcely if ever substantively "speaks for itself."

Basic procedural functions do not necessarily translate accurately across systems; for example, Spain's "*juez de instruccion*" does not have an easy legal homologue in the U.S. system. The basic doctrines of legal authority, precedent, interpretation, and even whether the language of a decision has a precedential role at all in that legal system for future cases will all have potentially large impacts on how and what a decision says; little if any of this can be understood and taken into account merely by finding language in a foreign case that appears to come from that legal system's highest court. What constitutes the "highest court" can mean different things in different legal systems, for that matter. Those who don't live in federal systems often find surprising the U.S. insistence that the federal courts cannot intervene in some kinds of state cases, even in such controversial matters as the death penalty or what, to the rest of the world, appear to be clear

cases of federal sovereignty over states in matters mandated by treaty (consular access for a criminal suspect, for example). But Americans often find puzzling how to fit the special “constitutional courts” of some legal systems into the hierarchical system of the U.S. federal courts.

American-style judicial review? It’s been adopted some places, but puzzles many other people abroad. The U.S. Constitution’s religion clauses—as seen by those whose constitutions mandate a serious, real commitment to a particular religion, such as juridically Islamic states? This leads to serious confusions. Many Islamic states have ratified many human rights conventions dealing with women’s or children’s rights, after all, but with the reservation that it is all subject to Shari’a law and its meanings. This makes it easy to carp about the United States being the terrible human rights outlier, one of a small number of states that has not ratified the women’s rights convention<sup>1</sup> or the children’s rights convention.<sup>2</sup> But a micron or so below the surface of purely formal treaty ratification numbers lies a quite different reality as to what places and states are least respectful of the rights of women and children or religious minorities. Moreover, the differences are not merely between the judicial processes or constitutional doctrines within the field of judicial activity; the role of the judiciary in a constitutional order means very different things in a parliamentary versus presidential system, a constitutional order with a deliberate separation of powers versus a constitutionally unitary understanding of the state.

One could go on and on, but the point is two-fold. Comparativism counsels permissions, and indeed, an obligation to look comparatively in order to seek to see through the dark glass of one’s own system, views, and presuppositions. At the same time, it counsels limitations, because undertaking this comparative work requires deep knowledge of how anything apparently substantive is embedded in the dense web of its own system, history and derivation. Comparativists, we might say, are the “anthropologists” of academic law—and, in ways not entirely dissimilar to the traditional methods of cultural anthropology, propositions of apparently universal substance are hedged up and located deep

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1. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

2. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

within local structures of knowledge and ways of establishing knowledge. These must be excavated, framed, studied and examined within their contexts. Otherwise, the process of grabbing this bit or that of some foreign legal system and proudly displaying it as part of your legal system resembles less anthropology than Indiana Jones-style grave robbing. Real anthropology is hard; likewise, the real work of comparative law is hard.

From that perspective, the obligation to undertake comparison across systems will rarely yield "useable" propositions from the standpoint of what American judges and courts do every day—which is to say, rarely will American courts be able to use propositions from other systems to directly address particular cases in our system. In some kinds of cases, however—those that are not about a legal system's fundamental, constitutive documents, its constitution—comparative work is necessary and unavoidable in adjudication. Jurisdictions do touch each other; they interact, and, as the proponents of robust global governance never tire of saying, a globalized economy makes this increasingly true.

Everyone from Justice Stephen Breyer to Justice Antonin Scalia agrees, for example, that judges must consult foreign law in many cases involving the meanings in domestic law giving effect to treaty provisions or adjudication in domestic law that a treaty regime might mandate shall be undertaken by the domestic courts of all states party to the treaty. Indeed, in some instances, the treaty at issue, as embraced by the political branches in ratifying it, calls upon judges to seek convergence with other states' courts in its interpretation. The Convention on the International Sale of Goods (CISG), for example, contemplates that the commercial courts of all states-party to the treaty shall hear cases arising in their jurisdiction under the CISG and adjudicate them within the meaning and intent of the treaty and informed by the decisions of other tribunals in the world doing the same.

Yet these necessary points of contact between legal systems, requiring rules for determining jurisdiction and venue in an increasingly interconnected world, as well as substantive law on many things, are still different from the constitutive, constitutional documents of a polity and its legal system. These constitutive matters touch on the disciplines of "anthropology" and "intellectual history" that are so much a part of comparative law methodology. But they provide profoundly cautionary arguments, much of the time, for why there is so little that can be drawn by judicial action on its own from one legal system into another at the level of genu-

inely constitutive law. Constitutive legal documents—a system's constitution—have meaning only within the webs of legally formal and socially informal understandings and commitments that give those documents legitimacy.

Comparative constitutionalism in considerable part teaches, in other words, that knowledge of a society's constitutive legal documents includes the knowledge of just how embedded they are in thick social relations of all kinds. The implication is that, as a matter of descriptive fact, what one might want substantively to take from one legal system into another at the level of constitutionalism and constitutional interpretation necessarily takes with it large parts of the documents' background, history, and informal social understandings—because they are part of what it *is*, part of what constitutes the social and political order codified in, or, more precisely, *coded into*—a constitution. Those social relationships are not merely interesting background and history that are useful in interpretation.

This is not to say that some legal systems are not sufficiently close in common culture and history, shared political experience, and shared social relationships, that they cannot inform each other. Jurisprudence among states that inherit the common law or the civil law traditions sometimes share enough that this process can carry its own legitimacy: Australia and Britain, for example. But this can only get one so far, because the intellectual work of cross-fertilization between states and their legal systems is done, not by reference to some universal rule of law that is supposed to undergird all (genuine law-driven) legal systems, but instead by highly particularized commonalities of history, culture, and society that operate in the background.

Conflating one with the other is intellectually fatal. In this regard, one sorrows to recall that the eminent legal and moral philosopher Jeremy Waldron, at the height of the great debate of the mid-2000s over this “comparative constitutionalism,” wrote a short and elegantly argued book in favor of a great deal of comparative constitutional embrace.<sup>3</sup> Although the argument was subtle and more persuasive than I suggest here, the cases cited, alas, were largely so much those of developed Anglo-common law states that they could prove only the unremarkable proposition that New Zealand and Canada could indeed share constitutional

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3. See generally JEREMY WALDRON, *PARTLY LAWS COMMON TO ALL MANKIND: FOREIGN LAW IN AMERICAN COURTS* (2012).



jurisprudence—as they not so long ago once shared a Queen, which is to say, shared a constitutional order.

The United States and, say, Zimbabwe, China, Saudi Arabia, or Bhutan, by contrast? Were we to take the methods of academic comparative law seriously, they would force to the fore a great many questions that cases shared by New Zealand, Canada, and the United Kingdom could not answer.

### III. POPULAR SOVEREIGNTY AS THE U.S. CONSTITUTION'S SOURCE OF LEGITIMACY

Academic comparative constitutional law teaches us both the necessity of comparative understandings, but also just how limited the available scope to use that knowledge is in actual constitutional adjudication, in actual American constitutional cases, where the U.S. Constitution carries its own history and source of legitimacy. That history and source of legitimacy impose their own limits on how much U.S. adjudicators are able to engage in constitutional comparativism as a basis for decision—or even as a citable source with some analytic purchase or relevance to U.S. constitutional adjudication. This point has been made extensively in the academic literature and, not insignificantly, in judicial opinions (particularly those of Justice Scalia) calling out the use of foreign law in U.S. constitutional adjudication.<sup>4</sup>

The point, in sum, is that the particular constitutional tradition that gives rise to the U.S. constitution is popular sovereignty. The people are sovereign. Popular sovereignty as a basis for constitutional legitimacy might be normatively a bad theory, incoherent, or just morally wrong, of course. But it is hard to get around the descriptive fact of its centrality, particularly given that some version of it underlies most of the differences between the United States and many other states that otherwise share our commitment to liberal, rights-protective democracy and the rule of law. The post-war constitutions of Western Europe, for example, make

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4. *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting) (“We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant . . . . But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”); *Atkins v. Virginia*, 536 U.S. 304, 347-48 (2002) (Scalia, J., dissenting) (“Equally irrelevant [to the Court’s decision interpreting the Eighth Amendment] are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”).

treaties, as international law, *pari passu* if not superior to existing constitutional law; cannot fathom a “last in time” rule as between a treaty and a later domestic statute; find inconceivable a federalism that kicks the federal government out of state law conflicting with an apparent treaty obligation or its judicial interpretation; and so on. They are liberal democracies and the United States is a liberal democracy, but their histories lead them to constitutive incompatibility with the U.S. on exactly this point. The U.S. Constitution calls international law part of “our” law (as American international law academics never tire of saying, as though it were a union card), but it simply means something altogether different in U.S. law by comparison to what it would mean in many other countries. Yale constitutional law scholar Jed Rubenfeld—no conservative, he—put the *descriptive* point definitively, by comparison to the European tradition:

It’s essential here to distinguish between two conceptions of constitutionalism. The first views the fundamental tenets of constitutional law as expressing universal, liberal, Enlightenment principles, whose authority is superior to that of all national politics, including national democratic politics. This universal authority, residing in a normative domain above politics and nation-states, is what allows constitutional law, interpreted by unelected judges, to countermand all governmental actions, including laws enacted by democratically elected legislators. From this perspective, it’s reasonable for international organizations and courts to frame constitutions, establish international human-rights laws, interpret these constitutions and laws, and, in general, create a system of international law to govern nation-states. I call this view “international constitutionalism.”

....

The alternative to international constitutionalism is American, or democratic, national constitutionalism. It holds that a nation’s constitution ought to be made through that nation’s democratic process, because the business of the constitution is to express the polity’s most basic legal and political commitments. These commitments will include fundamental rights that majorities are not free to violate, but the countermajoritarian rights are not therefore counter democratic. Rather, they are democratic because they represent the nation’s self-

given law, enacted through a democratic constitutional politics. Over time, from this perspective, constitutional law is supposed to evolve and grow in a fashion that continues to express national interpretations and reinterpretations of the polity's fundamental commitments.

In American constitutionalism, the work of democratically drafting and ratifying a constitution is only the beginning. Just as important, if not more so, is the question of who interprets the constitution. *In the American view, constitutional law must somehow remain the nation's self-given law, even as it is reworked through judicial interpretation and reinterpretation, and this requires interpretation by national courts.* By contrast, in international constitutionalism, interpretation by a body of international jurists is, in principle, not only satisfactory but superior to local interpretation, which invariably involves constitutional law in partisan and ideological political disputes.<sup>5</sup>

One understands why the Europeans, or at least their academic elites, find this so troubling. Their own history tells them that this is a recipe for the world's worst wars, plain and simple. The experiences of those wars, in turn, have wired into their hearts and minds that a constitution must be a top-down affair; it is not something to be left to the people. It is the distinction—a part of practical political theory since the French Revolution at least—between the general and the popular will. They are likely always to embrace the enlightened general will over the un-wisdom of the “people.” But by the same token, popular sovereignty is wired into the hearts and minds of Americans as the source of constitutional legitimacy.

True, it has always been less so among American elites, which often incline to see the risks of “populism”—which they conflate sometimes too quickly with popular sovereignty. But Lincoln, one could argue, was no populist, and saw popular sovereignty as the constitutional ability of the people to choose their leaders wisely in a genuinely republican form of government. Elites today arguably prefer a diminution of popular sovereignty in favor of the rule of experts—today's expert elites, for example, whose claim legitimately to rule (and the distinction from “governance” here would

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5. Jeb Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, <http://www.wilsonquarterly.com/essays/two-world-orders> (emphasis added).

be an instructive digression) rests mostly upon their claims to expertise and technocratic skills. Not all American elites are impressed by this, to be sure. Professor Glendon is among those who pointed out (decades ago in her book *Rights Talk*<sup>6</sup>) that a republic based around popular sovereignty requires a reasonable level of civic virtue—a people whose liberty is secured by their own self-discipline. Technocratic elite rule, that is, rule by experts, cannot substitute for a minimum level of enlightened self-restraint among the citizenry if it is to keep its republic.

One can debate nearly endlessly whether top-down universalist constitutionalism or popular sovereignty is the better way. But if one holds popular sovereignty as one's vision and source of fundamental legitimacy, then it is simply a practical fact that drawing in comparative constitutionalism from constitutional systems grounded in very different conceptions of legitimacy will be more difficult, even in principle, than it otherwise would be—and if one is faithful to a thick-description method of comparativism, perhaps impossible. It's difficult because it becomes hard to answer Judge Posner's quip, made back in the midst of this grand debate, rejecting foreign law in constitutional adjudication: "No thanks, we already have our own laws."<sup>7</sup>

#### IV. JUDGES IN THE NEW GLOBAL LEGAL ORDER

The reason a public intellectual and prominent judge such as Richard Posner would offer such a remark at all is the rise and (mostly) fall of certain ideas at the heart of judging. They are the source of a judge's legitimacy: the role of national judiciaries and especially supreme constitutional courts in the processes of globalization; and the mechanisms of global governance that played themselves out from roughly the early 1990s to the late 2000s, but have since faltered in the U.S., if not necessarily elsewhere. The idea (in Tweet form) is that national judiciaries should see themselves, at least in part, as an elite global fraternity whose confrères (within, to be sure, the range of discretion that legal systems regard as a necessary feature of judging, and especially within the rhetorical and justificatory discretion permitted judges ac-

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6. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993).

7. Richard Posner, *No Thanks, We Already Have Our Own Laws*, *LEGAL AFF.* (July/Aug. 2004), [http://legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp).

cording to the terms of their particular legal systems) should strive to promote harmonization across constitutional systems, in the service of global governance. Judges, though legally creatures of their national political orders, should be socialized toward a globalized, universal-minded cosmopolitanism, so to help midwife the institutions of global governance of the future.

There was never anything untoward or unseemly about this, let's be clear. Part of what judges do in any system not run by robots is exercise discretion, including discretion in how to frame, declare, and justify their actions. Even in judicial systems where judges are far more hedged up in what they can do and how they can explain it than American judges (not many legal systems, it can safely be said, would be able to accommodate the frankly glorious tradition of a Judge Richard Posner or Judge Stephen Reinhardt or Judge Jack Weinstein), some discretion is still part of judging and there is room in many instances to reach to one kind of justificatory or explanatory material over another.

What was urged during this period was that judges across the globe should view themselves as part of a loose, but nonetheless real, global network, fraternity, consortium or what have you extending horizontally across the world's legal systems. Judges should embrace this judicial cosmopolitanism within the permissible national limits of their regulatory roles—regulating constitutional law and, in turn, its regulation of a nation's relationship to the international community as a community of *governance*. But this embrace is a matter of the psychological and social orientation of judges, motivated in no small part by the desire to have the respect of one's judicial peers, who increasingly will be understood by judges themselves to be other judges across the world also in this peer network. The dynamic that Anne-Marie Slaughter, in particular, urged in *A New World Order*<sup>8</sup> is not a legal mandate as such, and she is careful to emphasize that it has to remain cabined within the limits of judicial discretion as a matter of national law. Nonetheless, it encourages the socialization of judges into a global network that might most accurately be called seeking a global judicial peerage.

The effect, then, is to transform an argument about what it means to be a judge in a national legal system into a strategy for promoting a *sensibility*—promoting a psychological and social sense of judicial self that prizes elite judicial cosmopolitanism. It

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8. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2005).

is psychological because it consists of individually internalized attitudes about ideals of judging; it is social, however, because it promotes actions by judges to internalize those attitudes themselves, and then impart them to other judges as a process of peer group socialization. One way to do this is through sharing and approving judicial acts in favor of some particular global jurisprudence by members of the network. Judges are not paid in material wealth, after all, and psychological compensation in the form of prestige, respect, and so on is important. Judges ought to be inculcated, therefore, to look to the respect and approval of judges of other states and international tribunals, and from the international community's self-appointed *moralistes*, the international human rights NGOs. This sensibility would provide an important bulwark in the framework of legitimacy by which aspects of state sovereignty could be transferred over time to mechanisms of global governance.

Put in these very simple, abbreviated terms, it is hard not to make this out to sound shady, illegitimate, or conspiratorial, the stuff of 1950s Cold War science fiction novels about the subtle wiles of propaganda. I don't mean anything like that. It's a story about a battle of ideas about governance, globalization, and sovereignty after the fall of the Berlin Wall and the end of the Cold War. Those events unleashed a period of remarkably unbridled optimism among various global elites for the emergence of forms of global governance that would defang sovereignty and pick up the task of constructing a liberal international order of governance that was the original conception of it by the Americans in 1945, put on hold by the Cold War.

In that case, "defanging sovereignty" meant the rise of liberal internationalism as global governance, usefully defined by Francis Fukuyama as a belief in international law and institutions overcoming the anarchic power relations of sovereign states.<sup>9</sup> Yet despite liberal internationalism's impeccable American pedigree, dating back to 1945 and the founding of the UN, this would also necessarily mean dismantling sovereignty, at least in the meaning

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9. FRANCIS FUKUYAMA, *AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY* 7 (2007); see also Kenneth Anderson, *Goodbye to All That? A Requiem for Neoconservatism*, 22 AM. U. INT'L L. REV. 277 (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=973883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=973883).

that Abraham Lincoln famously gave it: a “political community, without a political superior.”<sup>10</sup>

Learned and eminent scholars—Anne-Marie Slaughter, as already noted, for example, in her *A New World Order*, Abram Chayes, and Antonia Chayes, or renowned political scientist Robert Keohane—debated whether the rise of liberal internationalism as global governance meant the loss of sovereignty or merely its transformation. And even if I was having none of it, many of the finest minds in the legal academy, in Europe and elsewhere, invested considerable energies in theories of post-sovereign global governance, and equally in the paths that might lead the world there. So, for example, should “global government” prove too difficult, we could retreat to “global governance”—governance without government. Or we could scratch expressly political theory, jettison (at least on the surface) the commitment to one substantive political view over another, and simply aim for a world efficiently run by its necessary bureaucracies; legitimacy would be reduced to technocracy, and legitimate governance would be redefined as that which makes the Internet run on time. Others (in Europe, especially) devoted themselves to celebrating the emerging constitutional theory of the European Union—the “post-sovereign” constitutional order *par excellence*—and elaborating ways in which the constitutional model of the EU could be scaled up to the whole globe, the “global constitutionalism” movement.

Still others decided not to announce a path, but simply to contemplate changes since 1990 and discern in them self-organizing global governance—whatever actually happened somehow could always be seen as leading to political shifts in the world toward the dismantling of the anarchic relations of sovereign states. Others looked for causal material and economic drivers of political global governance—as the world globalized economically, the pressures of a global economy would drive forward political global governance in order to overcome the economic limitations imposed by a politically fragmented world and squeeze out the unneeded political entities known as “sovereign states” as merely rent-seeking sovereign transaction costs on the global economy. Sovereignty, then, would be nothing gloriously political, but merely a monopolistic, hold-up, rent-seeking charge on global economic transactions. Still others believed in a psychological shift in the

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10. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), available at <http://www.fordham.edu/halsall/mod/1861lincoln-special.asp>.

hearts and minds of ordinary people, enabled by communications technology to make people and events around the globe effectively immediate to them, thus permitting the emergence of a cosmopolitanism that would underpin shifts away from sovereignty and toward a unified global order.

There were always skeptical voices, of course, but they customarily came from the ranks of “hard” international relations realists; their skepticism was directed toward whether the world could arrive at the dreams and visions of the global governance idealists. It was not about the content of the vision as such – not about the desirability of the vision. They were skeptics, not dissenters. Genuine dissenters from the normative vision (who might or might not also be skeptics about whether it was coming to pass) were far fewer in the precincts of elites, academics and policy folk, who paid attention to this stuff. I count myself as one, since the 1990s—normative dissenter and factual skeptic.

But Professor Glendon, too, in her always measured way, drew upon her work on human rights and its history as an idea in 1945 to urge that those announcing radically different orders of power and authority in the world might reflect carefully on the moral risks of disconnecting universal human rights from the authority of democratic sovereign states. I myself have been less measured, remarking that human rights universalists should be very, very careful what they wish for in the way of retreating sovereignty. The moral universalism that the human rights community has imagined for itself, since the 1990s to today, might be universal in its self-conception, but in practical fact it has always dwelled under the sheltering sky of a specifically *American* hegemony.<sup>11</sup>

#### V. COSMOPOLITANISM AT THE U.S. SUPREME COURT

This was life among the intellectuals and academics. But judges can be intellectuals, too, sometimes academics as well, and during this same time period, several Justices of the U.S. Supreme Court began to explore—in a tentative way, in bits and pieces of judicial decisions as well as other venues—the legitimacy of embracing global governance and what that might mean for a national judiciary. It was premised upon the prevailing ethos of globalization, economic drivers of globalization that, in the form of

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11. See KENNETH ANDERSON, *LIVING WITH THE UN: AMERICAN RESPONSIBILITIES AND INTERNATIONAL ORDER* 268 (2012).



international commercial and trade disputes, make up significant parts of the judiciary's daily work.

"Cosmopolitanism" as used here is not intended to be a theoretically deep idea. All that's meant is a way of looking at the world and acting toward it, by reference to the whole and not a single, narrow part of it; seeking not precisely abstract universalism, but principles for dealing with the world that nonetheless prioritize interconnections across it; identifying with impartiality over partiality, engagement with many parts of the world while retaining a slightly distanced, toward engagement with any particular part of it; the universal over the particular or the merely parochial.

A full account of cosmopolitanism at the U.S. Supreme Court, however, might also distinguish between two varieties as expressed in constitutional law: one that we might call "rationalist cosmopolitanism," associated with Justice Breyer, and the other "affective cosmopolitanism," associated with Justice Kennedy. Under the "rationalist" approach, references to constitutional courts of other states simply continue, as a matter of degree rather than kind, the way in which courts take each other and their jurisprudence into account in a world of increasingly dense economic, but also social, cultural, technological, and every other form of globalization. In this rationalist account, canvassing the positions of the courts of other nations considering similar problems might "cast an empirical light on the consequences of different solutions to a common legal problem," as he put it in his dissent in *Printz v. United States*.<sup>12</sup>

Critics like myself have raised any number of objections with this seemingly rational interest in learning about how other jurisdictions handle a common problem that is then expressed as a citation in an opinion on U.S. constitutional law. Many of the objections are implied by the aforementioned difficulties of comparison in comparative law. For that matter, if the point about globalization is about "common" problems, then a question regarding the application of the death penalty in the United States is not a "common" question, it's merely a "parallel" one. Absent special facts in which other jurisdictions are involved (such as execution of another state's national with claims of lack of consular access), "common" problems are those in which the answer given by one nation's courts might have cross-border effects on another state or its court system, raising a more-than-academic interest in at least

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12. 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

considering coordination. The most important situations of such “common” legal problems are commercial or trade issues that might have consequences for the U.S. or for some other sovereign in international economic relations, and they are not ordinarily constitutional problems. And yet, as the example of *Printz v. United States* demonstrates, leading foreign law citations in U.S. constitutional cases are not about “common” problems in that sense, but instead a rhetorical invitation to see the superiority of another jurisdiction’s answer to an arguably similar issue, almost always about core issues of values—the death penalty, for example.

Cool rationalism, particularly the anodyne suggestion that this is mere “empiricism,” somehow doesn’t seem quite right when the actual cases are those that implicate deep values. What is really at issue, it would seem, is whether constitutional law is supposed to instantiate not the values as expressed through the political processes of popular sovereignty within a sovereign political community, but instead to channel the universal values of global human rights, in which the role of the Supreme Court Justice’s role in constitutional matters takes on the sense of bringing the universal light of human rights—as found in foreign and international tribunals—to the less than enlightened people of the United States and their political representatives. It is easier to see this, however, by looking past the cool rationalism of Justice Breyer to the nakedly transcendental jurisprudence of Justice Kennedy.

Justice Kennedy’s leading citation to foreign and non-U.S.-accepted international law, as far as this argument over universalism goes, is found in *Roper v. Simmons*,<sup>13</sup> a 2005 Supreme Court case holding unconstitutional the imposition of the death penalty for crimes committed by those under the age of eighteen. Justice Kennedy’s opinion was remarkable because it specifically considered a treaty—the UN Convention on the Rights of the Child—to which the U.S. has considered becoming a party, but has not done so.<sup>14</sup> For many critics, myself included, this amounted to looking to a constitutional human rights ether dwelling somewhere above in the heavens and discerning in it moral propositions that must be embraced as law. Cosmopolitan, yes, but not in the coolly rationalist fashion of Justice Breyer—less rationality than soothsaying, a deeply emotional connection to notions of human rights

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13. 543 U.S. 551 (2005).

14. *Id.* at 622.

whose actual status in American law turned out to be curiously irrelevant.

#### VI. WHATEVER HAPPENED TO CREATING A "GLOBAL LEGAL SYSTEM" THROUGH GLOBAL NETWORKS OF JUDGES?

But that's cosmopolitanism at the level of citations to the law itself. The more fundamental question, in order to understand the high water mark for such embrace in constitutional law, is to what extent the Justices at the time accepted the arguments made, most notably by Anne-Marie Slaughter, in favor of a sort of global elite of judges, looking horizontally to each other to create what she called a "global legal system."<sup>15</sup> A benign extension, with some modest accommodations to other legal systems, of essentially American constitutional values? In Slaughter's formulation, it is benign only if one does not especially value the robustness of the First Amendment, or any number of different American practices in civil liberties<sup>16</sup>—a prominent function of the global networks of judges would be to create distinctly social pressures on American judges to see themselves and American standards on such things as free speech as global outliers.

The general idea (popular with some legal academics, human rights activists, and others of the international community equally eager to shut down Rwandan radio stations making an entirely serious call to genocide, and also shut up, say, conservative commentator Mark Steyn) was that American judges needed to be shorn of their historical sense that truly robust free speech was something honorable and the sacred obligation of an independent judiciary to defend against a government or a mob eager to shut down dissenting speech. American judges needed to be socialized into a different sort of society—an international one of fellow judges, whose good opinion would come to matter to them, and who would gradually cause them to feel (not just understand, but genuinely *feel*) that America's commitment to free speech was, effectively, yet another American vulgarity, and that in any case, it set a bad example in a world in which American arguments for robust free speech were really just permission to incite genuine mass slaughter.

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15. SLAUGHTER, *supra* note 8, at 65.

16. *Id.*

This amounts to a sort of shame-and-blame campaign—the standard playbook of human rights NGOs—to embarrass American judges into a sort of generalized embarrassment over the purity of American First Amendment jurisprudence, and to see the need to embrace the sort of “hate speech” limitations embraced by the countries of Europe or Canada. As a campaign, it is intended as a means to push U.S. constitutionalism back to the supposed global center occupied by those possessed of the better angels of universal values. But in order to have traction, such a reshaping requires a particular social context that invites such affect and emotion. Slaughter argued that the proper context was a global network of judges who, although “vertically” appointed by and accountable to their national authorities, would be shaped in their judicial character, so to speak, by this horizontal society<sup>17</sup>—a real society that would produce a genuinely global social orientation among judges and that would express itself in the underlying background assumptions that shape the discretionary and rhetorical practices that necessarily infuse judging.

This sounds conspiratorial; it is not and was not intended that way. It merely drew upon the fact that judges necessarily operate against a largely unstated set of background assumptions and world-view; it is perfectly legitimate to suggest that the sensibility of the attentive judge ought to be shaped and educated with particular values in mind. In a globalizing world, in which constitutions do not merely encode values, but human rights—the global mother of all other proper and universal values, on a certain way of seeing things—it’s perfectly legitimate to say that judges ought to be inculcated with a culture of global norms and look for their social approval not parochially to their own society, but to that of the more universal, more impartial and, hence, more *moral* rest of the world. No more judging merely through *our* glass, darkly.

Back in the early 2000s when it was first published, Chapter 2 of Slaughter’s *A New World Order* offered an elegant vision of judges being shaped by global networks of other judges<sup>18</sup> in order to help bring about a convergence of values at a global level, in light of international human rights and, seemingly, anything but the mechanisms of a sovereign people. Today, a decade later, in the resurgence of sovereignty, this seems almost an alternative universe, a fantasy—but in its moment, it *was* elegant and spoke

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17. *Id.*

18. *Id.*

to the sense of many global intellectuals that there *was* a genuine pathway forward.

Did Justices of the U.S. Supreme Court of the time lean toward it in any serious way? There were a handful of citations in cases. There were a handful of speeches that excited many. In retrospect, we academics seem to have over-read the commitment behind an address by a Supreme Court Justice to the American Society of International Law annual meeting: one says many flattering things about comparative and international law in such speeches, but in practice one does not quite mean them.<sup>19</sup> The most important statement on the subject turned out to be the public discussion of the use of foreign law in U.S. constitutional adjudication offered by Justice Breyer and Justice Scalia in 2005 at American University Law School.<sup>20</sup>

In the American University discussion, Justice Breyer was cautious about embracing anything close to the “networks of judges” view, let alone the emergence of the “global legal system” that Slaughter pressed in *A New World Order*. On the contrary, he embraced notably modest grounds for such citation—merely empirical expertise gleaned from how other judiciaries address certain similar problems, combined with an observation that such citation is not that big a deal. It’s not claimed as controlling precedent, or anything much like “precedent” or “legal authority.”<sup>21</sup> It’s not so different from a judge citing a line from Shakespeare.

Justice Breyer added (I paraphrase) that of course judges read all sorts of things, and if a judge reads opinions from other jurisdictions and draws insight from them, surely the judge ought to acknowledge them.<sup>22</sup> We can gloss that to say that it’s not as if judges are special ascetics, isolated in monastic chambers in order

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19. The speech was by Justice Ruth Bader Ginsburg from the 2005 American Society of International Law (ASIL) Annual Meeting. See Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. TIMES (Apr. 2, 2005), <http://www.nytimes.com/2005/04/02/politics/02ginsburg.html>.

20. Washington College of Law, “A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer,” (Jan. 13, 2005), transcript available at <http://www.wcl.american.edu/secler/founders/2005/050113.cfm>.

21. Justice Breyer, at one point in the discussion, stated: “[F]irst, of course, foreign law doesn’t bind us, constitutional law. Of course not. But these are human beings, more and more, called judges, who are human beings despite concern about that matter -- (laughter) -- human beings, called judges, who have problems that often, more and more, are similar to our own.” *Id.*

22. Justice Breyer stated: “If here I have a human being called a judge in a different country dealing with a similar problem, why don’t I read what he says if it’s similar enough?” *Id.*

to ensure that, when they come to judge, they have had no contact with anything other than the “law” or the briefs of the parties. And of course we would not want them to be that; the life of the law, at least American law, is experience of the world as lived, and we want our judges alive to the currents of our times, while still being able to separate themselves from the currents of society in order to be able to judge cases impartially.

The problem in part, however, is that *A New World Order* offered an elegant and convincing explanation of how the gradual accumulation of apparently authority-less citations by American judges to foreign cases in constitutional adjudication could eventually build a tower of authority that would move from mere adornment to “persuasive” authority. It might or might not ever formally be denominated “controlling” authority—triumph for liberal internationalist global governance though that would be—because persuasive authority will often be sufficient. Although it’s not difficult to construct a path by which Justice Breyer’s rationalism could make these moves, it is much plainer in the gradual, but actual slide down this slope represented by Justice Kennedy. The slide is easier to see, in part, because Justice Kennedy’s cosmopolitan commitments are rooted less in coolly instrumental rationality than in “affective” attachments to certain values. It’s an emotional attachment to deeply felt values about human rights, about their universal appeal and propagation, as well as an unabashed desire to use the tools of law to bend the arc of history to the good. Which is to say, it wears its constitutional heart on its sleeve.

The legitimacy, then, that Justice Kennedy seems to view as inherent in these judicial acts appears to derive from a deeply felt sense of their universality. Universality matters because, if these values (inevitably expressed as judicially enforceable rights) *are* universal, then the fact that they don’t have authority in *our* law is neither here nor there; it describes a defect of our law and its failure to properly value universal justice. Given, however, that as mere human beings we don’t have direct access to the commands of universal justice, the next-best test of universality lies in the approval of other legal systems and other judges, the overlapping consensus of the embryonic global network of judges.

This is not a crazy theory of constitutional adjudication in values-laden cases—even if the natural law theory that it implicitly relies upon is quite out of fashion and simply unworkable in a pluralistic society insofar as it is supposed to drive down from broad moral principles to settle particular instances and cases. But its

reliance upon the opinions of others in a global peer community for confirmation of universal values that ought to be made, even imposed, as *our* values, turns a method of nearly transcendental discernment of natural law into a process of seeking social, peer group approval as a way of confirming moral approval. Considered as social practice, in the sense that Slaughter describes as the socialization of judges to a global outlook, it looks an awful lot like the craving for social approval—and social approval, moreover, from everyone who would otherwise *not* be relevant. Journalists and other observers of the U.S. Supreme Court of the period under discussion here made note—a New Yorker profile by Jeffrey Toobin leading the way<sup>23</sup>—of Justice Kennedy’s engagement with such international networks, and offered a variety of essentially psychological explanations of it. Some of them were crudely patronizing—a need for approval by a provincial lawyer who still suffered from social insecurities, quite the opposite of the born-to-cosmopolitanism Justice Breyer, being the accompanying thought, expressed openly or not.

The armchair psychologizing is unworthy, in my view, and its underlying social arrogance causes it to miss the core point. Justice Kennedy’s philosophy of judging has seemed to many smart lawyers and legal academics to be intellectually second-rate, vacuous, expansive but empty, rhetoric rather than reason—yet there is, in my view, a role in constitutional judgment for something that is not about syllogism. Justice Kennedy’s constitutional method, at least in regard to the use of foreign or international law sources, is rooted in a worldview of universal values and a core belief that these values are not so much “derived” as “apperceived.” This is usually expressed by saying that Justice Kennedy embraces the “natural law” tradition, but I think the aspects of discernment and apperception are his defining characteristics, for present purposes. In my view, this more than anything else accounts for Justice Kennedy’s otherwise quite bizarre citation to a treaty that the United States has quite consciously declined to ratify and an article of which addressed exactly the issue in the case, *Roper v. Simmons*. Shocking and wrong, yes, bizarre, no.

But if this is true of Justice Kennedy’s constitutional methodology, there is a critique with much stronger bite. While this kind of apperceptive, discerning constitutional philosophy is a long and

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23. Jeffrey Toobin, *Annals of Law: Swing Shift*, NEW YORKER (Sept. 12, 2005), [http://www.newyorker.com/archive/2005/09/12/050912fa\\_fact](http://www.newyorker.com/archive/2005/09/12/050912fa_fact).

valued part of the American constitutional tradition, the apperception of these values customarily has been by reference (even if only tacitly) to America: to Americans, *we* the sovereign people, *our* values, the better angels of who *we* are. In that regard, even the appeal to universal values is still an appeal to us and to our judgment, and so, even if imposed by the Court, it is nonetheless an imposition in the form of an invitation to our better natures. When the appeal to universality is said to receive its greatest confirmation precisely because it is by reference to everyone but us, its imposition is just that, an imposition lacking in legitimacy.

Our law has moral *lacunae*, sure, and there is a time-honored, though limited, legitimate appeal to morality to respond to them—but the legitimacy therein is not by reference to the universal, but to us. It's not by using the "universe" of "universal materials" to apperceive "universal values," and still less so measured by the "international." There's no reason to believe that the "international"—as expressed by any supposed consensus of foreign law or international law not assented to by the United States—is identical to the "universal." "International" and "global" are not the same as "universal."

The legitimacy of "apperceiving" moral values and giving them nearly unmediated application in constitutional law (at least in the constitutional cases where they cannot be legitimated by application of direct syllogisms of the law itself) lies in its appeal to *our* values. It is not Justice Kennedy's affective constitutional method that creates this particular problem; it is, rather, that he invests his affections in universal values (in the admittedly small set of cases in which foreign or un-assented international law is at issue) that are then tested by reference to the planetary whole rather than the American community. That would seem to create a legitimacy problem for a system premised on popular sovereignty. But we must also acknowledge that there is a reply to this: the universal values drawn from the international community are *also* American values. There is no genuine gap between them. They are just, in a word, universal human rights. Since when are Americans against universal human rights?

Well, of course Americans think that human rights are real and important and universal. But we *also* think it perfectly acceptable for their meaning and content to be determined for us—for this political community, through the processes of popular sovereignty and the American Constitution. This is not moral relativism, though it is often mistaken for it: the objection is not from relativ-



ism but from skepticism. The quarrel is not with the objective existence of certain universal rights and values (though their content might be disputed in any given case); the quarrel is with *who* is entitled authoritatively to pronounce them and through what process. The international community (and arguably both Justice Kennedy and Justice Breyer, in this period of their jurisprudence) makes an assumption that has long received little skeptical attention. It is to assume that the “universal” and the “international” or “global” are the same thing, so that merely national constitutional processes for determining the content of universal rights and values must necessarily be “partial” and inferior to the supposedly universal, and therefore “impartial,” processes of the international community.

But this identity is suspect. Global does not mean universal; it merely means not attached to particular geographies. The “interests” and “partialities” of the international community might not be attached to a particular chunk of territory—but is merely the partiality of those who are rootless and geographically detached, elites who live in the jet stream between New York and Geneva, the “interests” and “partialities” of those who do not have a territorial geography. Why should anyone accept that these people have any special moral authority to instruct everyone else on the content of universal values? Why shouldn’t the U.S. constitutional system, which has, after all, been doing this for a long time, be thought by its own people to have at least as good a claim on articulating the “universal”?

In other words, it’s not merely by reason of American parochialism or small-minded nationalism that, during this period, judicial confirmation hearings in Congress began to take sharply critical account of what appeared to be a growing affection for “universal” values, as defined by the “international community.” It is not improper for senators to inquire as to the sources of law that a nominee to judicial office regards as legitimate authority and in what ways; the question that goes to the heart of what a nominee regards as the ground of the Constitution’s legitimacy. The answers signal important commitments under the Constitution. There is nothing dishonorable, of course, in affirming the “global” as the “universal” to which one is committed as the ultimate source of authority. But it is also not easily reconciled with being a Supreme Court Justice in a system committed to *we* the people as sovereign.

## VII. THE U.S. SUPREME COURT IN RETREAT FROM UNIVERSALISM TO EXTRATERRITORIAL JURISDICTION

That was then. It was a moment in constitutional time lasting perhaps fifteen or twenty years, from around 1990 until the late 2000s. Although for convenience this essay has frequently used the present tense to refer to this period, in fact, it is largely in the past. The period of time in which one could talk of a “global legal system” and global judicial networks and convergence around norms by national judges is, on a genuinely global scale, done and over. With it largely, too, the flirtation by some Supreme Court Justices in those years with citation to foreign courts in constitutional adjudication. Never say never, of course, but it does seem likely that future citations will seem more like one-off oddities. They will be isolated and unmoored, lacking an intellectual apparatus standing ready to sustain them and grounded in some larger ideological agenda of the kind that *A New World Order* was ready to offer the judges of the world a dozen years ago.

What happened? After all, this process still moves forward within Europe, and not just among international law academics, who continue to produce volumes on global constitutionalism and the ways it is supposedly happening and how it is supposed to move forward. Among jurists in the EU, one could debate at length to what extent judicial discourse has changed, if at all, but in order to make relevant comparisons to the U.S. Supreme Court, one would have to carefully explore the systemic similarities and differences. A good place to start would be the decisions of Germany’s constitutional court in recent years addressing actions of the European Central Bank responding to the euro crisis of the past five years and whether they violate inviolable terms of the German constitution. German nationalism—national judicial nostalgia for the discipline of the Deutschmark and the Bundesbank? Or the German constitutional court acting in accordance with German constitutional law—but, in the very same judicial decision, acting on behalf of the EU’s greater good and from a concern to maintain the march toward sustainable, long-run EU? On that latter interpretation, a national constitutional court’s decision aims at saving the EU from the tendency of ideal-and-ideology enterprises to be unable to correct course, in their zeal to fulfill the grand political plan without deviation, and so march themselves off the cliff?

In the United States, though, any alleged judicial march toward embracing some set of global norms in constitutional interpreta-

tion (evidenced by a willingness to look to the practices of other countries, in order to draw the U.S. back to the supposed global center on important questions of values) appears quite dead. It might return sometime and in some way, but not in its current form. Nor is this a matter of U.S. legislators exercising sway over the process by pressuring nominees to publicly repudiate the practice and what it signifies, or an executive branch understanding the political need to select nominees to the bench with this political caveat in mind. It appears for now that the Court as a whole has retreated from some of the key tenets of universalism that were once thought to undergird the practice.

The place to see this best is in the recent trajectory of universalism in American courts defined (as likewise in the foreign citation debate) by values issues and human rights is the Alien Tort Statute (ATS)<sup>24</sup>. The ATS is the famous statute dating back to the First Judiciary Act of 1789, providing a federal court remedy in tort for suits by aliens for violations of the law of nations or a treaty of the United States. Long dormant and forgotten, it was revived by human rights advocates in the 1970s and 80s as a way of bringing civil lawsuits against persons alleged to have participated in rights abuses, such as alleged torturers. The statute is "universal" in the sense that it permits suits by aliens against aliens for alleged acts taking place entirely outside of the United States. In that sense it was regarded as a national statute providing for universal jurisdiction by U.S. courts, because it required none of the traditional bases of international law for a national court to assert jurisdiction, save for universal jurisdiction itself. Because defendants rarely showed up to defend themselves, cases were won by default, and district and circuit courts sometimes took the opportunity to deliver ringing statements about human rights and endorsement of the universalist view.

By the late 1990s and early 2000s, however, the targets of ATS suits had shifted from judgment-proof defendants to multinational corporations with operations conducted through nationally separated, legally distinct, limited-liability corporate entities. These corporate entities had deep pockets (at least collectively), and although in many cases U.S.-headquartered or chartered multinationals were the defendants, in other cases, the corporate defendants might be Canadian, or British, or Dutch, or Chinese. The ATS required no ordinary jurisdictional connection to the U.S.—

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24. 28 U.S.C. § 1350 (1948).

an exemplary universal jurisdiction statute in that regard—so a Chinese multinational corporation might just as easily be sued as an American one.

America's closest friends and allies—the UK, the Netherlands, Canada, Australia, and others—had long expressed concern about the apparently limitless (which is to say, universal) reach of the ATS, even after the Supreme Court made (what turned out to be ineffectual) moves to rein it in and tighten up its subject matter requirements in the case of *Sosa v. Alvarez-Machain*.<sup>25</sup> Their concerns were partly about the ATS' universality—but universality in the context of a statute that had the effect, whatever its original intention, of establishing a regime of civil liability in international law along with liability in international law beyond states that reached to entities (such as corporations) rather than individuals for criminal violations such as genocide or crimes against humanity. But the Supreme Court took no action, even as lower court cases endorsed all of these things as, in the first place, not contrary to the literal language of the single-sentence ATS, and permitted by the gradual accumulation of expanding lower court precedent. The Court finally agreed to hear a case providing a clear circuit split once the Second Circuit ruled, in sweeping language in its decision in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>26</sup> that the ATS did not apply to corporations because, under international law, they were not entities subject to the “law of nations.”

After hearing argument on the question of corporate liability under the ATS, the Court took the surprising move of asking the parties for additional briefing—setting the case for the following Term—on the quite separate, and logically prior, question of whether cases like *Kiobel*, which involved a foreign plaintiff, foreign defendant, and entirely foreign activity (so-called “foreign-cubed” cases) had any business in federal courts at all.<sup>27</sup> The Court handed down its decision in April 2013,<sup>28</sup> in a superficially unanimous decision with a five-vote majority opinion by Chief Justice Roberts and a concurrence in result only by Justice Breyer that was endorsed by four justices.<sup>29</sup>

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25. 542 U.S. 692 (2004).

26. 621 F.3d 111 (2d Cir. 2010).

27. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (directing parties to file supplemental briefs).

28. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

29. It should be noted that Justices Kennedy and Alito also filed concurrences.

Another ideologically-driven, 5-4 decision from the Court? Surprisingly not. For the purposes of understanding the end of the constitutional moment of a genuinely globalized judiciary based around convergence on universality, the majority and the concurrence shared the most important fundamentals. All nine Justices appear today to share a view that the proper way to see ATS cases—with judicial reasoning that draws upon and extends to different kinds of cross-border disputes, as will almost certainly be seen in the Court's decision in *Bauman v. Daimler*,<sup>30</sup> to make a guess based upon its oral argument—is not by reference to universality, but instead by an analysis based upon traditional bases of jurisdiction (apart from universal jurisdiction itself) found in international law. In effect, this turns the inquiry into one centered around the grounds for asserting extraterritorial jurisdiction, in which the jurisdictional question is not settled simply by reaching to universal jurisdiction but instead requires a nexus under territory, nationality, and subject matter, as well as the related doctrines of comity, closeness and contacts, and so on.

This will leave plenty of room to reach different conclusions about different cases, but at a minimum, the universality that allowed *Kiobel* itself to proceed as a foreign-cubed case has been banished. Chief Justice Roberts adopted a test based on the judicially created “presumption against extraterritorial application” of a statute (absent a clear intent of Congress).<sup>31</sup> Justice Breyer adopted a more holistic contacts-based approach that, he made clear, would draw under it the serious human rights abuser who is either present or (it seems likely as a reading of the concurrence) has assets in the United States.<sup>32</sup> And yet Justice Breyer's test was framed, not in the universality terms—often sweeping, moralistic, and categorical—that generally characterized ATS opinions of the 1980s onwards, but instead in traditional jurisdictional terms: who would have sufficient contacts with the United States to sustain jurisdiction?<sup>33</sup>

### VIII. SOVEREIGNTY AFTER HEGEMONY

The U.S. Supreme Court's shared assumptions in *Kiobel*—majority or concurrences—suggest a very different climate of rea-

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30. 133 S. Ct. 1995 (2013) (memorandum opinion granting certiorari).

31. *Kiobel*, 133 S. Ct. at 1665.

32. *Id.* at 1671 (Breyer, J., concurring).

33. *Id.*

soning at the Court today.<sup>34</sup> The earlier period was characterized by a hesitant, mostly cautious, but still fundamentally approving, embrace of universality through a globally shared set of judicial values. Citation to opinions of foreign courts in constitutional adjudication is one modest marker of that.

Or maybe not: it's perfectly possible to argue the contrary and say with a shrug that there's little reason to believe that foreign citation ever had the importance that this essay, among many other academic writings, has attributed to it. It was never a harbinger of things to come within constitutional jurisprudence and still less as some grand ideological vision of globalization. For that matter, if it's a mistake to see the foreign citation dispute as anything other than a minor squabble over what to put in largely unnoticed string cites in an opinion, likewise pumping up *Kiobel* into some replacement ideology is even less convincing. Moreover, whereas the citation to foreign law in constitutional adjudication is by way of justification for how to impose a norm otherwise unsupported or only weakly supported internally in U.S. law on the American people as a constitutional matter, ATS cases such as *Kiobel* are the obverse, this normative force turned inside-out—the imposition of American interpretations of supposedly universal norms externally, outwards on others in the world not otherwise connected to the United States. The two are not necessarily inconsistent.

The best way to see the decline of the foreign citation argument, in other words, is exactly what Justice Breyer said—it's not big deal, but if you think it's *that* big a deal, I won't bother to do it any more, because (*A New World Order*, Chapter 2 notwithstanding) there's no grand plan here. As for Justice Kennedy, even assuming the transcendental apperception view suggested in this essay is right, it's not as if he can't perform the same act of discernment on purely domestic legal materials and reach exactly the same result. In any case, to the extent that there's been an evolution here, it has not been driven by any grand political, ideological, sociological, economic, or psychological causes or explanations. The simplest explanation—*entia non sunt multiplicanda praeter neces-*

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34. For a discussion of what *Kiobel* and the ATS mean for “sovereignty after hegemony,” see Kenneth Anderson, “*Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute’s Jurisdictional Universalism in Retreat*,” CATO INSTITUTE (2013), <http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2013/9/anderson.pdf>.

*sitate*<sup>35</sup> and all that—is internal to the law in this case: the Justices have learned the lesson that the comparative law scholars had been saying for a long time: citation to foreign opinions is a lot more complicated and subtle than it looks. It's not illegitimate as such, but it requires a thick understanding of the legal ecology in which that opinion dwells and has meaning. That's important, says the skeptic, because it doesn't require recourse to the larger, external issues that this essay has raised.

Skeptical take-down duly noted. But while accepting the force of the internal comparativist argument, it still seems to me that there's a larger, external agenda in play. It is partly ideological and partly political; more precisely, it is an ideological affinity *blocked* by a political reality. The ideological affinity is simply the tug and pull of liberal internationalism as global governance upon several of the Justices. Though never much more, in my estimation, for any of the Justices on the Court so inclined than a sensibility of cosmopolitanism, even so, it is far from irrelevant in the fundamental jurisprudential approach to universal normative claims. It is some evidence as to whether one's orientation—which is to say, sensibility—in constitutional adjudication looks fundamentally to a theory of popular sovereignty (a theory, of course, that has always accepted a role for counter-majoritarian institutions such as an independent judiciary so long as constrained by the fundamental terms of democratic constitutionalism). Or whether, instead, it senses legitimacy in drawing into constitutional interpretation the general will, the universal will, by comparison to which the people's will is barely relevant and certainly not a source of legitimacy.

The politics that have blocked this path are, in a word: China. China's rise has signaled a resurgence of sovereignty—sovereignty with a very different, very *old* meaning—that renders the dream of a rising liberal internationalism as global governance just that—a dream. It was still possible to hold that dream during the constitutional moment that has just passed; I would have objected to its normative character, but today, it is simply not descriptively plausible, at least not without some heroic assumptions about politics and the normative pull of law. Yet why, someone will ask, is sovereignty any greater a bar today than it was any time before?

It's a good, brutal question and the answer is equally brutal. The dream of universal human rights, liberal internationalism,

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35. "Entities should not be multiplied beyond necessity."

and global governance was only possible, it turns out, when it dwells under the sheltering sky of American hegemony. A loose and undemanding American hegemony that doesn't much care even if those who benefit from America's rough order and security noisily reject the terms of hegemony in favor of liberal internationalism and demand that America transfer the instruments of its hegemony over to the international community.<sup>36</sup> Or at least be willing to act as an instrument of the international community, rather than as the hegemon acting in its own interest (which is, *nota bene*, why the hegemon is trusted in things that truly count rather than the international community's collective-action-failure-prone "collective security") but which provides significant global public goods as well, such as the security and freedom of the high seas and the airspace above it.

This is a complicated account, because it requires an explanation of hegemony and its relationship to the international community, and the relationship of hegemony to claims of universal values. But the conclusion is the same: the dreams of global governance in a liberal internationalist world, universal values and universal human rights, are possible only under a broadly liberal democratic hegemon. And it was only under that hegemony that both the dream of an emerging "global legal order" or, for that matter, the American ATS or other states' mechanisms of universal jurisdiction, were ever possible.

But American hegemony is seemingly under pressure and in retreat. Nowhere so much as in the eastern Pacific, where America's security commitment and with it, the perception that a bellicose shift of the status quo would meet with a vigorous American military response, are both in some doubt. Whether American hegemonic security in the Pacific is actually in doubt, I do not know—but it is clear that American allies and China all harbor questions about it. Take the decline of American hegemony by assumption, however. Does it seem possible that this really has no implications for the possibility and nature of international legal relations, through such jurisdictional mechanisms as the ATS or (fondly held) background assumptions about the rise of liberal internationalism and global governance?

It's hard to imagine that the international political perception of hegemony (which is never a matter of mere power alone, but instead of a broad, rough legitimacy that transforms the use of pow-

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36. See generally ANDERSON, *supra* note 11.



er into authority) does not impact how governments and courts see the claims of normative universalism and universal values. The claims of universalism might start to seem an unaffordable, unsustainable sentimentalism: do the United States government, the Obama Administration, and the administrations that come after really think it will be politically prudent to allow Chinese corporations to be sued in American courts by non-Americans for activities, none of which take place in America? It is a mistake to attribute political motives of this kind to Justices of the Court in a single case, at least not without clear evidence of it. Yet a reasonably clear general incentive for both government and the judiciary might predict an overall trend toward replacing expanding concepts of universal jurisdiction with much more limited, sovereignty-linked tests found in traditional bases of extraterritorial jurisdiction—whether *Kiobel*, or *Daimler*, or other cases of extraterritorial jurisdiction.

Yet, by the same token, the decline of universalism makes global governance claims that depend upon giving up important aspects of sovereignty less attractive because there is no good reason to think they will be reciprocated by anyone who matters. And in any case, even such seemingly unimportant activities by the judiciary—citing foreign law or un-assented international law in constitutional cases—is not likely to seem attractive in a world in which the rising sovereigns, the new powers or great powers, are more likely to be, if not themselves illiberal authoritarians, less impressed with arguments that promoting liberal democracy is a priority of the new world order. That was a reality of the international community that could long be masked—the totality of the international community could be reduced to the views of the “good guys,” the Nordics or Costa Rica or New Zealand, while the much more dicey moral reality of the world could be suppressed. But the actual nature of the “international community” can’t be suppressed in a world in which American hegemony is in serious retreat and China’s version of illiberal, undemocratic sovereignty, not liberal internationalism, is ascendant and admired as a path to economic success that eschews liberal democracy as a snare and a trap and simply unnecessary.

## IX. CONCLUSION

The question for the future, then, is whether *any* member of the U.S. Supreme Court is going to think it a prudent or attractive exercise to cite to foreign courts, or to international law to which

the U.S. has not assented, in cases interpreting its own Constitution, as a way of underscoring the moral authority of the international community in channeling universal values—in a world in which the international community takes on much more of the character of China than Sweden. And, in the absence of the restraining weight of the world's security and economic hegemon, an international community whose members embrace exercises of sovereignty that owe little to liberal internationalism and its form of global governance.

It's possible that citation or deeper forms of judicial integration—in case law or common interpretations—will take hold as a form of solidarity among liberal democracies that sense the pressures coming at them from a new world order that takes its cue from sovereignty unconstrained by liberalism. Indeed, I believe something like this might well take place among societies with pre-existing affinities: Britain, Canada, Australia, or New Zealand, for example; or within the EU as part of its ongoing process of integration; or even among liberal democratic Latin American states (perhaps as they address issues such as labor rights or environmental issues arising from foreign investment, or seek to revise increasingly controversial Bilateral Investment Treaty regimes). Perhaps even the United States would join in; but whether from a position of strength (as the hegemon citing the courts of weaker states in support of its liberal democratic struggles) or weakness (as the declining hegemon seeking strength in numbers) is an open question.

With one important exception—Justice Kennedy's reliance upon an un-ratified treaty for a deeply values-laden proposition on human rights<sup>37</sup>—actual citations to foreign law in U.S. constitutional jurisprudence date have been little more than adornments—little more than what Justice Breyer said they were. The concern among critics was always to nip it in the bud before it could grow into something widely grounded in judicial opinions at all levels of courts as a basis for appealing to international human rights law as a ground for imposing supposedly universal claims on Americans in an end-run around domestic sovereign practice. It's easy to scoff, now that the practice has largely been stopped in its tracks, that it never was more than what it was; like the ATS and other judicial mechanisms that reach to open-ended international

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37. *Roper v. Simmons*, 543 U.S. 551, 622 (2005).

law moralizing, once embedded, they have no natural stopping points.

This is an observation that Mary Ann Glendon has emphasized many times in her writing: rights-talk is self-inflating. It's one of the reasons why Professor Glendon's work, even dating back twenty or more years, bears re-reading. The political feedback processes that tend to put the brakes on the one-way ratchet of rights-talk in U.S. domestic law are much less able to do so when the claims come from vague declarations of universal human rights law, the formulation and claims to authority of which lie in the hands of constituencies largely outside the U.S. political process. In a world in which the persistence of American hegemony is in genuine question, foreign law citation in constitutional adjudication is part of a cluster of extraterritorial jurisdiction practices that are likely to be revisited if the international political environment continues to shift away from American power. Universalist versions of the ATS or universal jurisdiction claimed by national courts in an expanding way are likely to contract—as they already are. There are excellent internal legal explanations for this, but the external political factors surely play some kind of role. It's always possible that predictions like this come a cropper, of course. But absent some kind of serious resurgence of American hegemony in a way that is not just about power, with America's security and economic power underwriting the fundamental conditions of stability (particularly in the Pacific), supporting players such as the judiciary must eventually follow the decline.

In that case, universal jurisdiction by national courts or reaching extraterritorial jurisdiction doctrines are likely to contract over time, at least in part because their universalist claims depend not upon universality but upon hegemony. In a world of American hegemony in retreat, however, what's rising is not a global community of shared values, but instead sovereigns far less constrained by U.S. power and far less attached to liberal values. Judiciaries of the diminished powers are less likely, it seems to me, to embrace universalist or reaching extraterritorial claims because they can't back them up and because the political branches of those governments see a sharp increase in political risks.

Sustained American hegemony would be better. The proudly universal claims of values and rights proffered by the "good guys" of the international community have always depended (far more than many might want to admit) on a hegemonic order that allowed them to portray their claims as universal rather than simp-

ly as the overlapping values of the hegemon. Claims of universal human rights owe far less to America paying a decent respect to the opinions of mankind—at least if that is supposed to mean embracing the norms and authority of the international community as global governance—than America's long-run exercise of global power in as decent a way as would yet be effective.<sup>38</sup>

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38. THOMAS BERGER, *ARTHUR REX: A LEGENDARY NOVEL* 484 (1978).